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Anne Peters, *Beyond Human Rights: The Legal Status of the Individual in International Law* (translated by Jonathan Huston) (Cambridge, Cambridge University Press, 2016) 644pp ISBN: 9781107164307 Price: £89.99

*Beyond Human Rights: The Legal Status of the Individual in International Law*¹ is a translation by Jonathan Huston, revised and updated by the author, Anne Peters, of the 2013 monograph entitled *Jenseits der Menschenrechte: Die Rechtstellung des Individuum im Völkerrecht*.² A valuable and extensive analysis is provided on the rise in prominence of the individual in International Criminal Law, the Law of Armed Conflict, the Responsibility to Protect doctrine (R2P), law regulating humanitarian assistance, Investment Law, Consular Law and Diplomatic protection.

The book claims that the individual has international legal personality, defined as ‘the capacity to be a holder of international rights and duties’.³ However, the central proposition is that the ‘massive increase ... in the practice and *opinio juris* of acknowledging rights and duties on a large scale has ... crystallised ... an *original (primary) international legal personality of the human being*’.⁴ Treaty provisions, customary international law, general principles of law under Article 38(1) of the Statute of the International Court of Justice⁵ (ICJ Statute) all indicate the original personality of the individual, unassailable and untouchable by the traditionally accepted central subject of international law: the state.⁶ Further, Article 6 of the Universal Declaration of Human Rights and Article 16(2) of the International Covenant on Civil and Political Rights, stating that ‘[e]veryone has the right to recognition everywhere as a person before the law’, confer international individual personality.⁷ This new international legal status is an expression of a normative individualism: ‘politics and law ultimately should be guided and justified by the concerns of the persons affected by them’.⁸

Peters’ argument is convincing in relation to individuals having capacity to bear rights and duties. However, the claim that the empirical study demonstrates original international legal personality, and that all of the doctrinal chapters represent a strengthening of the position of the

¹ Anne Peters, *Beyond Human Rights: The Legal Status of the Individual in International Law* (translated by Jonathan Huston) (Cambridge, Cambridge University Press, 2016).

² Anne Peters, *Jenseits der Menschenrechte: Die Rechtstellung des Individuum im Völkerrecht* (Tübingen: Mohr Siebeck, 2014).

³ Peters (n 1) 2, 32, 50.

⁴ Peters (n 1) 551 [emphasis added].

⁵ Statute of the International Court of Justice (adopted 26 June 1945).

⁶ Peters (n 1) 551.

⁷ Peters (n 1) 551.

⁸ Peters (n 1) 553.

individual in international law, may be challenged. This review is divided into two sections addressing these two points.⁹ The first section questions the assertion of original (primary) international legal personality of the individual: that there is evidence that international individual legal personality is not dependent upon state consent and to demonstrate instances of where the individual possesses law-creating power.¹⁰ The argument here is that Peters, first, predominantly recognises that non-state actors fall short of law-making capabilities; second, that the example of law-making capacity in *Tadić* does not withstand scrutiny;¹¹ and further, the claim that international courts ‘consolidate’ individual international personality is not fully made out. The second section of this review addresses one of the chapters that purportedly evidences a strengthening of individual legal personality: Chapter 8 addressing the development of the R2P doctrine. I argue that the doctrine of R2P does not in principle or practice illustrate prioritisation of the individual over states in international law.

Individual Legal Personality as Independent from the State

In order to support Peters’ proposition that there exists original international legal status, the international legal personality of the individual cannot be dependent upon state consensus and states cannot be the only actors with the capacity to create international law.¹² Original legal personality of the individual is usually denied on the grounds that only states can grant—or set aside—individual legal status, most obviously in relation to treaty-making but also through individual rights conferred under customary international law, which can ‘fall desuetude pursuant to state practice’.¹³ Positive international law needs to be generated by ‘direct’ democratic procedures without mediation by states, created directly by non-state actors.

For Peters, although transnationally operating businesses, arbitral tribunals, non-governmental organisations and certain international organisations can participate in discourse relating to norm creation, they are still not empowered to create binding norms of international

⁹ For a fuller overview of the layout and content of the book, see Andreas Th Müller, ‘Anne Peters, *Jenseits der Menschenrechte: Die Rechtstellung des Individuum im Völkerrecht* (Tübingen: Mohr Siebeck, 2014)’ (2015) 26(1) *European Journal of International Law* 295.

¹⁰ Ibid 434.

¹¹ International Criminal Tribunal of Yugoslavia (ICTY), Case No IT-94-1-AR72, *Prosecutor v Duško Tadić, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction*, Appeals Chamber of 2 October 1995.

¹² Peters (n 1) 434.

¹³ Peters (n 1) 409.

law.¹⁴ She cites the International Criminal Tribunal of Yugoslavia (ICTY) Appeals Chamber in *Tadić* as stating that the behaviour of insurgents contributes to the formation of new rules in the law of armed conflict¹⁵ as support for the proposition that non-state actors can potentially participate in law creation through their behaviour. However, this is a misconstruction of *Tadić* insofar as the Appeals Chamber merely recognised the lack of rules and regulation on non-state actor activity in non-international armed conflicts (NIACs). Only Common Article 3 to the Geneva Conventions and the 1977 Additional Protocol II regulated NIACs prior to *Tadić*. *Tadić* expanded rules applicable to NIACs by analogy to rules concerning international armed conflict (IAC), justifying the application of rules traditionally regulating IACs to the context of insurgencies in order to facilitate the development of international criminal law and prosecution of non-state actors:

Why protect civilians from belligerent violence, or ban rape, torture or the wanton destruction of hospitals, churches, museums or private property, as well as proscribe weapons causing unnecessary suffering when two sovereign states are engaged in war, and yet refrain from enacting the same bans or providing the same protection when armed violence has erupted ‘only’ within the territory of a sovereign State?¹⁶

The Appeals Chamber did not endorse the view that insurgents could create law but that the activity of non-state actors should come within the jurisdiction of the ICTY to facilitate their prosecution. The non-state actors would have argued that this development was in contravention of the principle of *nullem crimen sine lege* and would not have perceived it as an endowment of law-making powers.

The development of international law by international courts has strengthened and expanded rights, ‘consolidat[ing]’ individual international personality, according to Peters.¹⁷ While it is true that international judges and arbitrators enjoy judicial independence and this means that the development of law occurs without direct state control, this does not necessarily provide an indication of individual international legal personality. A sufficient connection is not made between the individual bringing the complaint who wishes to influence global governance—insofar as it affects them—through instigating proceedings at an international court, and the decision made by the international judge to perhaps grant or not grant the

¹⁴ Peters (n 1) 545.

¹⁵ Peters (n 1) 547 citing *Tadić* (n 11) [108]: ‘In addition to the behaviour of belligerent States, Governments and insurgents, other factors have been instrumental in bringing about the formation of customary rules at issue.’

¹⁶ *Prosecutor v Tadić* (Interlocutory Appeal on Jurisdiction) [97].

¹⁷ Peters (n 1) 549.

individual's wishes. An international judge who makes a decision in adversarial proceedings on the application of law to a given set of circumstances is not the same as the individual participating in law-making processes. While international judicial proceedings may facilitate individual participation in producing international law and increasing democratic accountability,¹⁸ that connection is not explicitly made here by Peters. Unconsidered are arguments as to whether international courts have law-making capacity at all, and debates on their legitimacy as law-making bodies as a minority of elites. Further discussion may have helped explain how they potentially facilitate original individual legal personality.

After stating that international court decisions consolidate individual legal personality, Peters concedes that court judgments are no substitute for democratic international law-making. In particular, courts only provide *ex post* accountability and not anticipatory accountability.¹⁹ What is required is a dual democracy, individual participation through domestic democratic participation procedures and direct individual participation in global governance, for original individual international legal personality to exist.²⁰ Peters' conclusion that individuals are 'halfway between ownership of rights and capacity to make law' is not synonymous with original international legal personality.²¹

A separate, but overlapping, argument posited is that courts provide an independent source of individual legal personality as interpreting bodies increasingly move away from reliance on the original intent of state drafters of the treaty and towards implicit protection of the individual.²² While Müller welcomes Peters' focus on 'individual rights' as distinct from 'human rights',²³ the latter would have helped the development of the argument on how courts have, or have not, contributed to the crystallisation of individual legal personality. The International Court of Justice decision in the *La Grande Case*²⁴ may represent an instance of where courts used their interpretation powers to prioritise the individual, but what of the voluminous human rights jurisprudence, including non-human rights courts, taking into account

¹⁸ See further, Jane M Rooney, 'The Paradox of Extraterritoriality at the European Court of Human Rights: A Global Constitutionalist Approach' (Doctoral Thesis, 2016) available at <http://etheses.dur.ac.uk/11888/> (last accessed 17 May 2018).

¹⁹ Peters (n 1) 550. See MacDonald and MacDonald who argue that *ex post* accountability can suffice as a form of democratic accountability: Terry MacDonald and Kate MacDonald, 'Non-Electoral Accountability in Global Politics: Strengthening Democratic Control within the Global Garment Industry' (2006) 17(1) *European Journal of International Law* 89.

²⁰ Peters (n 1) 550.

²¹ Peters (n 1) 551.

²² Peters (n 1) 414–15.

²³ Müller (n 9) 295.

²⁴ *La Grande (Germany v Italy)* (2001) ICJ 466.

human rights: will this body of jurisprudence not have a bearing on whether there is a visible normative shift towards the individual in international law, and whether the individual is prioritised over the state?

Article 31(3)(c) of the Vienna Convention on the Law of Treaties provides that ‘any relevant rules of international law applicable in the relations between the parties’ must be taken into account in the interpretation of treaties.²⁵ In this context, courts overseeing compliance and enforcement of their respective constitutive treaties may take into account human rights in their interpretation of the requirements of those provisions. For example, the *Kadi* decision of the European Court of Justice on 18 July 2013 and the *Nada v Switzerland* decision of the European Court of Human Rights in September 2013, both gave preference to human rights standards over UN Security Council (UNSC) sanctions under the UNSCR 1267 (1999) sanctions regime.²⁶ The outcome of those decisions provides strong evidence of the prioritisation of the individual that would give great credence to the ambitious thesis put forward by Peters. In contrast, the European Court of Human Rights in *Jones v United Kingdom* upheld the immunity of Saudi Arabian state officials accused of torture, pursuant to the International Court of Justice’s *Jurisdictional Immunities* judgment which clearly accepted prioritisation of state immunity over the *jus cogens* norm.²⁷ These decisions on fundamental human rights norms versus state immunity should have been included in the context of a thesis on the new normative shift of prioritisation of individual over the state, and would have tempered the normative appraisal. Consideration of the effect of human rights on other international law norms and vice versa may have also served to paint a more accurate picture of whether it is true that international law obligations are increasingly oriented towards the individual to substantive claims of crystallisation of original individual legal personality independent of the state.

International human rights courts often defer to states in establishing the content of rights, indicating prioritisation of the state over the individual. For example, the ‘margin of appreciation’ in the European context has led to blanket bans on the burqa,²⁸ a conception of reproductive rights that prioritises domestic consensus over European and international

²⁵ Vienna Convention on the Law of Treaties (adopted on 23 May 1969, entered into force on 27 January 1980).

²⁶ *European Commission & the Council of the European Union v Yassin Abdullah Kadi*, joined Cases C-584/10 P, C-593/10 P and C-595/10 P [2013] ECR; *Nada v Switzerland*, Application no 10593/08 (ECtHR, 12 September 2012). See further, Erika de Wet, ‘From Kadi To Nada: Judicial Techniques Favoring Human Rights Over United Nations Security Council Sanctions’ (2013) 12(4) *Chinese Journal of International Law* 787.

²⁷ *Jones v United Kingdom* (2014) 59 EHRR 1; *Jurisdictional Immunities of the State (Germany v Italy: Greece intervening) (Judgment)* (International Court of Justice, General List No 143, 3 February 2012).

²⁸ *SAS v France* [2014] ECHR 695.

consensus,²⁹ and the killing of 800 civilians who were hostage to Chechen terrorists as a proportionate use of force by the Russian state,³⁰ to name a few instances of where the state is prioritised over the individual. Judges do not necessarily find in favour of the interests of the individual as the more powerful state actors can be determinative of the very existence of the international organisation for which they adjudicate. Human rights jurisprudence is unavoidably illuminating in deciding whether there is an emerging original international legal personality, and there are many indications that the state is prioritised over the individual in this context.

Article 38(1) of the ICJ Statute stipulates that in order to qualify as a general principle of international law, the principle needs to be widespread in domestic law and transposable to the international level.³¹ Peters contends that there is universal recognition of legal personality of the individual in private law: all individuals can contract, buy property, make wills, etc. However, she neglects that some private law transactions are not available to all individuals, not even in liberal-thinking, western democratic societies. One example is the private transaction of marriage which creates rights and obligations between spouses. In Northern Ireland, in the United Kingdom, same-sex marriage is prohibited and the marriage of a same-sex couple in a different jurisdiction will not be acknowledged as their legitimate legal status in Northern Ireland for the purpose of pursuing further private transactions.³² The state decides who can engage in this private transaction and from whom private rights and obligations can ensue, which does not point to recognition of original individual legal personality. It is not apparent that there exists under Article 38(1) ICJ Statute a widespread recognition of domestic original individual legal personality.

Ultimately, the book leaves us less than certain that non-state actors are close to establishing an ability to create law or that there has been a ‘massive increase ... in the practice and *opinio juris* of acknowledging rights and duties on a large scale’ which has then ‘crystallised ... an *original (primary) international legal personality of the human being*’.³³

²⁹ *A B C v Ireland* (2011) 53 EHRR 13.

³⁰ *Tagayeva v Russia*, Application no 26562/07 (ECtHR, First Section 13 April 2017).

³¹ Peters (n 1) 421.

³² *In Re X* [2017] NIFam 12, 17 August 2017.

³³ Peters (n 1) 551 [emphasis added].

Responsibility to Protect

While Müller commends the careful distinctions drawn between *lex lata* and *lex ferenda* by Peters, they should be viewed with greater suspicion in the context of the broader argument of the book which is that the empirical and doctrinal chapters evidence the crystallisation of a customary international norm of an international individual right. One chapter which deals with *lex ferenda* is Chapter 8 on R2P and humanitarian assistance. Here I argue that the doctrine of R2P does not in principle or practice provide evidence of prioritisation of the individual over states in international law.

The Responsibility to Protect (R2P) is defined in the UN General Assembly World Summit Outcome Document³⁴ as requiring that '[e]ach individual State ... protect its populations from genocide, war crimes, ethnic cleansing and crimes against humanity'.³⁵ States must take 'collective action ... through the [UN Security Council (UNSC)], in accordance with the Charter, including Chapter VII, on a case-by-case basis ... should peaceful means be inadequate and national authorities are manifestly failing to protect their populations'.³⁶ Peters is an advocate of R2P, and recognises the normative desirability of a shift from the state right to intervene towards a possible obligation to intervene, and from non-intervention towards non-indifference to mass crimes³⁷ and a 'victim-centric' approach. State sovereignty must only be justifiable as an instrument to protect human beings. A state's own sovereignty is contingent upon its responsibility towards the inhabitants of its territory. If a territorial state is 'unwilling or unable' to honour this responsibility,³⁸ it temporarily forfeits its territorial integrity and therefore protection against third party intervention.³⁹ Peters specifies that R2P should entail a procedural obligation to justify non-intervention, especially an obligation for the permanent members of the UNSC to justify veto.⁴⁰

³⁴ United Nations General Assembly World Summit Outcome Document 2005, UN Doc RES/60/1, paras 138–40.

³⁵ Ibid para 138.

³⁶ Ibid para 139.

³⁷ Peters (n 1) 237.

³⁸ Peters (n 1). See further, 'Responsibility to Protect', United Nations Office on Genocide Prevention and the Responsibility to Protect, available at: www.un.org/en/genocideprevention/about-responsibility-to-protect.html (last accessed 17 May 2018).

³⁹ Ibid 237.

⁴⁰ Ibid 240.

Whether or not R2P can be justified on the grounds that it is ‘victim-centric’ and prioritises the needs of the individual over state sovereignty itself is debatable. The ‘unwilling or unable’ doctrine, a central justification for state military intervention under R2P, was used by the Obama administration to expand the scope of the application of the right to self-defence under Article 51 of the UN Charter, stating that:

ISIL and other terrorist groups in Syria are a threat not only to Iraq, but also to many other countries, including the United States ...

States must be able to defend themselves, in accordance with the inherent right of individual and collective self-defense, ... when, ... the government of the State where the threat is located is unwilling or unable to prevent the use of its territory for such attacks.

The Syrian regime has shown that it cannot and will not confront these safe-havens effectively itself. Accordingly, the United States has initiated necessary and proportionate military actions in Syria in order to eliminate the ongoing ISIL threat to Iraq, including by protecting Iraqi citizens from further attacks and by enabling Iraqi forces to regain control of Iraq’s borders.⁴¹

In other words, as the Syrian Government was ‘unwilling or unable’ to protect its own people and nationals of other states from the threat of ISIS, this was justification for multinational forces to resort to military intervention in Syria. This was without UNSC approval. In this context, Ntina Tzouvala argues that the ‘unwilling or unable’ doctrine ‘reintroduces a hierarchy of states in the operation of *jus ad bellum*’ whereby states’ rights and duties are tailored accordingly.⁴² This is reminiscent of the ‘infamous nineteenth-century distinction between civilised, semi-civilised and uncivilised states ... civilised states enjoyed full international legal personality, while uncivilised states were just objects ... of international law’.⁴³ This ‘unapologetically’ challenges the notion of sovereign equality—that all states are sovereign and equal.⁴⁴ Therefore, rather than orienting the international legal system towards the interest of individuals, R2P in adopting the doctrine of ‘unwilling or unable’—which justifies third party intervention and undermining of state sovereignty— facilitates the use of force by powerful actors by providing a legal basis to take action against other, destabilised states. This is not so

⁴¹ Samantha Power, Letter written on 23 September 2014 to Mr Ban Ki Moon, Secretary-General of the United Nations.

⁴² Ntina Tzouvala, ‘TWAIL and the “Unwilling or Unable” Doctrine, Continuities, and Ruptures’ (2016) 109 *American Journal of International Law Unbound* 266.

⁴³ Ibid, citing James Lorimer, *The Institutes of the Law of Nations: A Treaties of the Jural Relations of Separate Political Communities* (London, William Blackwood and Sons, 1883).

⁴⁴ Ibid.

much a shift towards the individual as victim, as a consolidation of the political power of strong states against other weaker states.

That foreign military intervention leads to less human loss or atrocity is not inevitable. Peters recognises that the UNSC-mandated NATO intervention in Libya ‘did not improve the situation of the population’.⁴⁵ NATO admitted to a number of fatal mistakes during its 9,658⁴⁶ strike sorties in Libya, including one on 19 June 2011 in Tripoli that lead to civilian deaths.⁴⁷ While the number of deaths resulting from the NATO bombardment of Libya is contested, modest estimations are that 60 civilians were killed and 55 wounded,⁴⁸ while others place the numbers into the thousands, arguing that NATO provided indispensable support for atrocities committed by insurgents.⁴⁹

The fixation on R2P as ‘military intervention’ rather than consideration of the other two tenets of R2P—prevent and rebuild⁵⁰—calls into question the real motives of foreign states that decide to intervene in territories where populations, and often the government, are vulnerable. This is evidenced in relation to the intervention in Libya. Amnesty International reported that EU Member States did ‘not adequately respond ... to the unfolding human tragedy by assisting those fleeing conflict and persecution in Libya to reach safety’ despite backing the NATO campaign in Libya, and the declared *raison d’être* as being the protection of civilians.⁵¹ In 2017, the UN Refugee Agency (UNHCR) recorded 1,073 people dead or missing in that year alone on the treacherous passage between Libya and Italy.⁵² Some reports estimate that the UK spent 13 times more on the NATO bombardment than on post-conflict rebuilding.⁵³

⁴⁵ Peters (n 1) 6.

⁴⁶ ‘Counting the Cost of NATO’s Mission in Libya’ *BBC Online* (31 October 2011), available at www.bbc.co.uk/news/world-africa-15528984 (last accessed 17 May 2018).

⁴⁷ NATO, ‘NATO Acknowledges Civilian Casualties in Tripoli’ (NATO, 19 June 2011), available at: www.nato.int/cps/en/natolive/news_75639.htm (last accessed 18 May 2018).

⁴⁸ Report of the International Commission of Inquiry on Libya, UN Human Rights Council 19th Session, A/HRC/19/68.

⁴⁹ Seumas Milne, ‘If the Libyan War Was About Saving Lives, it was a Catastrophic Failure’ *The Guardian* (26 October 2011), available at www.theguardian.com/commentisfree/2011/oct/26/libya-war-saving-lives-catastrophic-failure (last accessed 18 May 2018).

⁵⁰ See, eg, Sandra Fabijanić Gagro, ‘The Responsibility to Protect (R2P) Doctrine’ (2014) 3(1) *International Journal of Social Sciences* 61.

⁵¹ Amnesty International, ‘The Battle for Libya: Killings, Disappearances and Torture’ (Amnesty International, 2011) 87–88.

⁵² Lizzie Dearden, ‘Refugee Death Toll Passes 1,600 in Record 2017 as Charities Attacked for Conducting Mediterranean Rescues’ *Independent* (22 April 2017), available at: www.independent.co.uk/news/world/europe/refugee-crisis-migrants-asylum-seekers-mediterranean-see-libya-italy-ngos-smugglers-accusations-a7696976.html (last accessed 18 May 2018).

⁵³ Jody Harrison, ‘UK Government Spent 13 Times more Bombing Libya than on Rebuilding Post War’ *Herald Scotland* (26 July 2015), available at

R2P is not sufficiently defined to be practicable or to prevent against the blurring of the line between legitimate motives of protection of a population and opportunistic intervention by third party states. While Peters prescribes that the UNSC has the status of guarantor, the ‘unwilling or unable’ doctrine is being used to justify intervention without UNSC approval.⁵⁴ Peters may acknowledge that ‘the codification or recognition of a direct and transboundary international individual right to protection ... could easily be abused as an excuse for intervention and could in practice hardly or only selectively be enforced’, but it is unclear why she does not recognise these difficulties in the concept of R2P as it is currently understood.

Conclusion

The assertion that ‘individuals take precedence over states as subjects of international law cannot be justified on the basis of international law as it currently exists’.⁵⁵ While many of the developments evidenced by Peters may on their face indicate the strengthening of the position of the individual in international law, the inherent remaining weakness of the individual vis-à-vis the state should be considered when asking whether a normative shift has occurred.

Global governance has shifted once again since the publication of the translation of the original monograph. Burundi is the first state to leave the International Criminal Court (ICC) amongst numerous threats of withdrawal,⁵⁶ whilst contemporaneously the crime of aggression will come into force in December 2017 which may see more Western state leaders being prosecuted—or maybe not. ICC Prosecutor, Fatou Bensouda, has requested the Pre-Trial Chamber to authorise an investigation into allegations of war crimes committed by the UK and US in Afghanistan. The European Union (EU) has lost the membership of the UK, and remaining in, or leaving, the EU forms part of electoral manifestos of parties in Member States across Europe. This signifies an abrupt reassertion of the state in Europe. In the UK, it signals revocation of individual rights through the disabling of the principle of direct effect of EU law enshrined under section 2(1) of the European Communities Act 1972. This was pointed out in

www.heraldscotland.com/news/13499912.UK_government_spent_13_times_more_bombing_Libya_than_on_rebuilding_post_war/ (last accessed 18 May 2018).

⁵⁴ Peters (n 1) 248.

⁵⁵ Müller (n 9) 248.

⁵⁶ Gambia and South Africa have revoked their declarations of withdrawal from the ICC.

Miller which insisted upon parliamentary intervention for the triggering of Article 50 of the Treaty of the European Union rather than through the prerogative, as withdrawal entailed depriving UK citizens of fundamental rights.⁵⁷ The status of the individual remains unpredictable rather than entrenched in international law. Whilst some specialist legal regimes have embraced the individual as a subject or potential subject, powerful state and non-state actors provide constant reminders of their vulnerability as active participants in global governance, which undermines the assertion of a normative shift towards prioritisation of the individual.

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⁵⁷ *R (on the application of Miller) v Secretary of State for Exiting the European Union* [2017] UKSC 5 [69]–[73].